(10)

No. [redacted] 119

Supreme Court of the United States.

OCTOBER TERM, 1943.

THOMAS J. CASEY, TRUSTEE,
Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOMAS J. CASEY,
Attorney pro se.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

Table of Authorities Cited.

CASES.

STATUTES.

Supreme Court of the United States.

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THOMAS J. CASEY, TRUSTEE,
Petitioner,
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas J. Casey, Trustee in Reorganization of Carlton Hotel, Inc., of Boston, Massachusetts, respectfully shows the following:

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the Bankruptcy Act, U.S.C. 1940 ed., Title II, Sec. 47C, and under Section 240 of the Judicial Code as amended, U.S.C. 1940 ed., Title 48, Sec. 347.

Opinions Below.

The District Court of the United States for the District of Massachusetts on October 7, 1943, entered an order denying the motion of the respondent that the reorganization proceedings be dismissed or that the debtor be adjudged a bankrupt (R. 8).

The Circuit Court of Appeals for the First Circuit on the 31st day of January, 1944, vacated said order and remanded the case to the District Court for further proceedings (R. 29). The opinion of the Circuit Court of Appeals (R. 23-28) is reported in 141 Fed. (2d) 104.

On the 7th day of March, 1944, the Circuit Court of Appeals for the First Circuit denied the petition of the petitioner for a rehearing of the respondent's appeal (R. 29).

Statutes Involved.

The statute involved is Chapter X of the Bankruptcy Act of 1898 as amended (U.S.C. 1940 ed., c. 10).

Summary Statement of Matter Involved.

For the factual background see opinions in 134 Fed. (2d) 162 (1943), and 139 Fed. (2d) 207 (1943), from which it appears that on the 5th day of August, 1942, Carlton Hotel, Inc., a corporation, which owned and operated a hotel property in Boston known as Hotel Buckminster, filed a petition for reorganization pursuant to Section 128 of Chapter X of the Bankruptcy Act as amended, setting forth, among other things, that there were mortgages upon its property held by the respondent "the terms of which are burdensome and in need of adjustment."

Said petition was approved by the Court on August 18, 1942, and the petitioner herein was duly appointed trustee.

On August 17, 1942, the United States of America took by eminent domain the use and occupation of the Hotel Buckminster for a term of years and paid into the registry of the District Court for the District of Massachusetts the sum of $34,945 as condemnation moneys for the use and occupation of said premises up to the 30th day of June, 1943, and thereafter on or about the 1st day of July, 1943, the further sum of $40,000 as condemnation moneys for the use and occupation of said hotel until the 30th day of June, 1944.

Under the terms of the mortgage given by the debtor to the respondent the sum of approximately $3100 is payable monthly as follows: $1000 on account of principal, $1000 on account of taxes, and the balance on account of interest. There is no acceleration clause in the mortgage. No payments have been made to the respondent of sums becoming due monthly since August 1, 1942. The petitioner has at all times been ready to pay said sums out of the condemnation moneys, but the respondent has contested the right of the petitioner to apply these moneys against these arrears and has demanded all of the condemnation moneys in lieu of its security.

The assets of the debtor exceed its liabilities, both secured and unsecured, and there is cash available to pay the respondent all payments due upon its mortgage to date and to pay the claims of the unsecured creditors in full.

The debtor's plan of reorganization was filed on April 12, 1943 (R. 4). It contains no provision for the adjustment of the respondent's mortgage. It contemplates the immediate payment in full of all priority debts and all arrears on secured debts. General unsecured creditors are to be paid in full in twenty monthly instalments. The plan recites that no provision is made for the stockholders of the

debtor, for the reason that all creditors of all classes who have proved their claims according to the orders of the Court and upon the approval therewith and in such manner as approved by the Court will be paid one hundred cents on the dollar, so that upon the completion of the payments to the creditors the property, after deduction of costs and expenses, will be returned to the debtor corporation.

On June 29, 1943, the respondent moved in the alternative that the reorganization proceedings be dismissed or that the debtor be adjudged bankrupt for the reason, among others, that "the document filed April 12, 1943 entitled 'Debtor's Plan of Reorganization' providing for an extension of time for payment of the unsecured obligations of the debtor is in truth and fact an arrangement under the provisions of Chapter 11 of said Title 11 and not a plan of reorganization within the terms and provisions of said Chapter 10 and that the relief provided for under said Chapters 10 and 11 are mutually exclusive and that said document was not filed in good faith but was filed for the purpose and with the intent of hindering and delaying liquidation of the debtor's estate in appropriate proceedings" (R. 8). On October 7, 1943, the District Court entered an order denying said motion of the respondent (R. 8).

Specifications of Error.

The Circuit Court of Appeals erred—

(1) In vacating the order of the District Court of the United States for the District of Massachusetts of October 7, 1943.

(2) In ruling that the reorganization of the debtor under Chapter X is either unnecessary or impossible.

(3) In ruling that the plan of reorganization as drafted has not been and could not be approved by the judge as an acceptable plan under Chapter X.

(4) In ruling that the proceedings under Chapter X should be terminated.

(5) In ruling that the plan is not a Chapter X plan at all because all it proposes is to effect a composition with reference to the unsecured debts—in other words, for an arrangement within the purview of Chapter XI.

Questions Presented.

The questions here to be presented are:

(1) Does the fact that, subsequently to the approval of the debtor's petition for reorganization, in which all the jurisdictional facts are alleged, the trustee acquires from the conduct of the debtor's business funds sufficient to liquidate in full the claims of the secured creditors so that it then becomes unnecessary to adjust the terms of the respondent's mortgage divest the debtor petitioner of the right to proceed under Chapter X?

(2) Is the plan of reorganization no more or less than a composition with general creditors which might have been presented under Chapter XI of the Bankruptcy Act?

(3) Assuming that the plan of reorganization is no more or less than a composition with general creditors which might have been presented under Chapter XI of the Bankruptcy Act, is that fact a reason why the Court must disapprove it?

Reasons for Granting the Writ.

It has been the practice of the District Courts throughout the United States to approve plans for reorganization

of corporations having secured creditors under Chapter X of the Bankruptcy Act even where the plan makes no provision for the adjustment of the terms of the security but provides solely for composition, payment or extensions of the unsecured claims. The decision of the Circuit Court of Appeals in this case invalidates this almost universal rule and requires the determination of the Supreme Court of the United States.

Prayer for Writ.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the First Circuit had in the case numbered and entitled on its docket, No. 3955, "John Hancock Mutual Life Insurance Company, Appellant, v. Thomas J. Casey, Trustee, Appellee," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the First Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

THOMAS J. CASEY,
Pro Se.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For the opinion below, jurisdiction, statutes involved, summary statement of matter involved, specifications of errors, questions presented, reasons for granting the writ and prayer for writ, I respectfully refer the Honorable Court to the petition contained above.

Argument.

POINT 1.

Does the fact that, subsequently to the approval of the debtor's petition for reorganization in which all the jurisdictional facts are alleged. the trustee acquires from the conduct of the debtor's business funds sufficient to liquidate in full the claims of the secured creditors so that it then becomes unnecessary to adjust the terms of the respondent's mortgage divest the debtor petitioner of the right to proceed under Chapter X?

In order to be entitled to reorganization under the provisions of Chapter X the petition must set forth and the debtor must prove that there were mortgages on the property the terms of which are burdensome and in need of adjustment.

The debtor's petition for reorganization recited that adequate relief could not be obtained under Chapter XI because there were mortgages on the property the terms of which are burdensome and in need of adjustment. The District Court for the District of Massachusetts approved the debtor's petition on the 18th day of August, 1942. The approval of the petition determines conclusively this alle-

gation to be true. See Section 149 of the Bankruptcy Act (11 U.S.C. 1940 ed., Sec. 549), which provides:

> "An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court "

The petitioner submits that they are none the less true because by reason of subsequent developments the debtor acquires funds to liquidate the demands of the mortgagee. It can make no difference whether this new money is contributed by stockholders or is earned by the debtor in the conduct of its business or is derived from the Government in payment for the use and occupation of the hotel. The jurisdiction of the Court under Chapter X cannot be ousted by events that occurred after the filing of the petition in this case on August 5, 1942.

Point 2.

The plan of reorganization is more than a composition with general creditors which might have been presented under Chapter XI of the Bankruptcy Act, for the reason that it contemplates the payment in full of all arrears due on secured debts and provides that the continuance of the obligations be assumed by the debtor.

Point 3.

The mere fact that the plan of reorganization is no more or less than a composition with general creditors which might have been presented under Chapter XI of the Bankruptcy Act is not a reason why the Court must disapprove it.

In the case of *In re Janson Steel & Iron Co.*, 47 Fed. Supp. 652 (D.C. E.D. Pa. 1942), the plan provided that general unsecured creditors were to be paid 70 per cent of the amount of their claims. It was asserted by the objecting creditor that the plan is improper and not as contemplated by the statute under which the proceeding was filed. The District Court, in holding said contention as being without merit, said the following at page 658:

> "The mere fact that the plan of reorganization is not more or less than a composition with general creditors which might have been presented under section 12 of the Bankruptcy Act, as amended, 11 U.S.C.A. Sec. 30, is not of itself a reason why the Court must disapprove it. Every plan of reorganization involves a debtor and creditors and every reorganization is in the broad sense a composition. Downtown Inv. Ass'n vs. Boston Met. Bldgs. (C.C.A., 1st Cir), 30 Am.B.R. (N.S.) 1, 81 F. (2d) 314. . . . The test does not lie in the characteristics of the plan presented but whether it is fair and feasible. That means whether it is economically expedient, without discrimination or destruction of vested rights. In re R. L. Witters Associates (D.C.), 19 F. Supp. 648, 651."

The same principle was set forth by the Circuit Court of Appeals for the First Circuit in the case of *Downtown Investment Association* v. *Boston Metropolitan Buildings*, 81 F. (2d) 314, 323, where the Court said:

> "Reorganization plans under 77B may differ from offers in composition in form and complexity, but the difference is little more than one of degree. A plan of reorganization when accepted is nothing more than an agreement between the debtor and its creditors and

stockholders, or if the debtor has been declared insolvent, then between the several classes of creditors."

In *In re 325 East 72nd Street, Inc.*, 53 Fed. Supp. 997 (D.C. S.D. N.Y. Feb. 8, 1944), where the same question was litigated in the District Court for the Southern District of New York, subsequently to the decision of the Circuit Court of Appeals in the instant case, the Court said, by Bright, D.J.:

> "The availability of chapter X does not depend upon whether the debtor is solvent, or insolvent. It is offered to a corporation before or after bankruptcy intervenes. Sections 127, 128. The corporation may be insolvent, or unable to pay its debts as they mature. Section 130 (1). . . . The purpose of the Act was to avoid the consequence to debtors and creditors of foreclosures, liquidations and forced sales with their drastic deflationary effects. Case v. Los Angeles Lumber Products Co. 308 U. S. 106-124, 60 S. Ct. 1, 84 L. Ed. 110. The Act seeks to preserve going concern values so that they will be available for the payment of claims against the debtor and for the protection of its interests. In re Dover Boiler Works, D.C., 38 F. Supp. 701-704. The earnings, present and prospective, are a sine qua non. Consolidated Rock Products Co. v. DuBois, 312 U.S. 510-525, 61 S. Ct. 675, 85 L. Ed. 982; . . . Compromise settlements and concessions are a normal part of the reorganization process. Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 318 U.S. 523-542-565; 63 S. Ct. 727."

It follows, therefore, that the plan was an acceptable Chapter X plan, and that the Circuit Court of Appeals

erred in vacating the order of the District Court of October 7, 1943, and in ruling that the plan is not a Chapter X plan, in ruling that the reorganization of the debtor under Chapter X is either unnecessary or impossible, and in ruling that the plan as drafted has not been and could not be approved by the judge as an acceptable plan under Chapter X.

Respectfully submitted,

THOMAS J. CASEY,

Pro Se.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 1068. 119

THOMAS J. CASEY, TRUSTEE,
PETITIONER,
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Subject Index.

Table of Authorities Cited.

Cases.

Statutes.

Textbooks.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 1068.

THOMAS J. CASEY, TRUSTEE,

PETITIONER,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of Facts.

On October 5, 1942, the District Court ordered that, not later than December 15, 1942, there be a statement of the proposed plan for reorganization filed with the clerk (Record, page 3).

On December 15, 1942, the District Court extended the time for filing the debtor's plan for reorganization to not later than March 15, 1943 (Record, page 3).

On March 12, 1943, the District Court extended the time for filing the debtor's plan for reorganization to not later than April 15, 1943 (Record, page 4).

On April 12, 1943, a document entitled "Debtor's Plan of Reorganization" was filed with the clerk (Record, pages 4 to 7).

On June 29, 1943, the respondent filed a motion to dismiss the proceedings for reorganization or, in the alternative, to adjudge the debtor a bankrupt (Record, page 7), which motion was denied (Record, page 8). Upon appeal to the Circuit Court of Appeals said order was vacated and the case remanded to the District Court for further proceedings not inconsistent with the opinion (Record, page 29).

The Circuit Court's reasons for vacating the order appear in the opinion, but may be summarized as follows:

1. No proper plan was filed within the time specified.
2. The plan was not a proper plan under Chapter 10.
3. The reorganization of the debtor corporation was either impossible or unnecessary and no reasons were shown for further continuation of the proceedings.

Many of the facts discussed in the Court's opinion were to be found in the records of the two prior appeals in this case, which are not in the record accompanying the petition for certiorari. Without the complete record, no proper determination of the merit or lack of merit of the plan or the Circuit Court's decision can be made.

The Summary Statement of Matter Involved (Record, pages 2 and 3) in the Trustee's Petition for Certiorari contains certain inaccurate statements of matters omitted from the record filed with the petition.

From the omitted records it can be ascertained that the taking by the United States was of a portion only of the mortgaged premises, not the whole thereof, as may be inferred from the Summary Statement. The statements that

the petitioner has, at all times, been ready to pay the mortgage arrears out of the condemnation moneys, that assets of the debtor exceed its liabilities, and that there is cash available to pay the respondent all payments due upon its mortgage to date and to pay the claims of unsecured creditors in full are all matters which are open to dispute and are to be determined in future proceedings.

In the second appeal in these proceedings (139 Fed. (2d) 207) the Circuit Court held: "The mortgagee's lien attaches to the rents as they are collected and to the compensation paid by the United States for use and occupancy of the premises . . . such security interest may not be impaired by any distribution by the trustee of the funds in his hands to junior creditors or by any other disposition of the funds of no benefit to the mortgaged property."

From the omitted records it appears that the only funds in any substantial amount are the rents (in the hands of the trustee) and the condemnation fund. The statement that funds are available for the payment of unsecured creditors ignores the opinion of the Circuit Court.

Argument.

Of the reasons stated in Rule No. 38 for granting a review on writ of certiorari, the petitioner attempts to bring his writ within only one of the several reasons stated, and that one is that the Circuit Court has decided an important question of federal law which has not been but should be settled by this Court. As a matter of fact, it is not clearly indicated by specific words that that reason is the one applicable to the present case. It can only be inferred by process of elimination; none of the others are even suggested.

The petition states as reason for granting the writ that it has been the practice of District Courts throughout the United States to approve plans for reorganization of corporations having secured creditors under Chapter 10 where the plan makes no provision for adjustment of the security, but provides solely for composition, payment or extension of the unsecured claims. He asserts that this has been the practice of the District Courts, yet he cites no cases and offers no example where this has been done. A practice so widespread as he suggests to be a "universal rule" should at least be supported by one or more examples thereof.

The only case cited which may suggest such a practice is *In re Johnson Steel & Iron Company*, 47 F. Supp. 652, which was a case arising under Section 77b, but disposed of after the Chandler Act, amending the Bankruptcy Act by making Chapters 10 and 11 thereof mutually exclusive. The Chandler Act was designed to prevent such practice in this regard as may have existed under the provisions of Section 77b. In that case the effect of the provisions making Chapters 10 and 11 mutually exclusive were not discussed, and the plan was rejected for other reasons. It is certainly inconclusive authority for the proposition that such a practice exists or is proper.

The facilities available for the purpose of obtaining delay under the more complicated proceedings provided by Chapter 10 are far greater than under Chapter 11. The proceedings under Chapter 10 were designed to take care of complicated situations involving the adjustment or marshaling of claims among divers classes of secured and unsecured creditors. The proceedings under Chapter 11, however, afford very little opportunity for delay and are designed to speedily take care of situations where adjustment of unsecured debts only is desired and no adjustment of claims of secured creditors is to be effected.

The very purpose of separating the provisions of Chapter 10 and Chapter 11 and the sections making them mutually exclusive, 11 U.S.C. secs. 501 and 701, would be defeated if both classes of cases were allowed to proceed under Chapter 10.

The petitioner argues as a First Point in his brief that the Court, once having obtained jurisdiction under Chapter 10, cannot be ousted by events which happened subsequently to the filing of the petition. His point is unsupported by authorities and his argument would seem to be contrary to the express provisions of the Act. It appears clear that if, during the proceedings, events occur subsequently to the filing of the petition, which make it impossible or unnecessary to effect a reorganization, the proceedings should be dismissed and the parties allowed to pursue other remedies. The Circuit Court in its opinion has pointed out the possibility of amending to comply with provisions of Chapter 11. Section 147 of the Bankruptcy Act specifically provides for such an amendment, and after such an amendment is allowed that proceedings shall thereafter proceed as if originally filed under Chapter 11. If the purpose of continuing the proceedings under Chapter 10 is not to avail themselves of the greater facilities for delay, it may be pertinent to inquire why the trustee or the debtor does not avail himself of Section 147 of the Bankruptcy Act.

Point Two of the petitioner's brief is merely an assertion unsupported by argument, demonstration or authority. The fact that the plan filed contemplated the payment in full of all arrears due on secured debts, and that the continuance of the secured obligations be assumed by the debtor, adds or detracts nothing to or from what any plan filed under the provisions of Chapter 11 must of necessity contemplate.

The argument of the petitioner in Point Three may have been applicable under the provisions of Section 77b but is

no longer applicable under the new Act (U.S.C. tit. 11, c. 10, secs. 501, 547 and 701).

But the defect in the petitioner's position is even more fundamental than the procedural aspects. The trustee blandly assumes that he has in his hands funds sufficient to liquidate in full the arrears on the claims of the secured creditors, and funds in prospect sufficient to pay the unsecured creditors in full. The plan proposed (Record, page 4 *et seq.*) is based upon that assumption and the assumption that the funds which the trustee has in his hands may be treated as general assets, if not in whole, at least in part. In a prior appeal, 139 Fed. (2d) 207, it was established that the respondent here had a lien upon the rents and the condemnation moneys. The trustee has admitted that unless he can use part of the condemnation funds to pay the unsecured creditors it will be impossible to work out any plan of reorganization (Record, page 27). If he can use a part of these funds as general assets, reorganization under Chapter 10 is obviously unnecessary.

The Circuit Court has recognized that with respect to the condemnation fund a question of marshaling may arise, but since that question was not properly raised on this appeal and since it was not argued before them, they have made no decision on it. The question of marshaling which will arise is suggested and clearly indicated by the record of the two prior appeals. The respondent here has a lien on two funds, the condemnation moneys and the rent moneys, and in addition has a first mortgage on the real estate and on the personal property. There exist second and third mortgagees who have rights in the condemnation fund by virtue of their mortgages on the real estate but do not have liens upon the rent moneys or the personal property. If the rules of marshaling applicable in the reorganization proceedings require the first mortgagee to first apply the rent moneys in payment of the arrears on its

mortgage before any application is made of the condemnation fund and the condemnation fund is applied upon the mortgage, no funds are available to effect a reorganization.

That such is the probable result is indicated by—

General Laws of Massachusetts, c. 79, sec. 33.

8 C.J.S. page 1345, sec. 467.

38 C.J.S. page 1365 *et seq.*

Broadway National Bank v. *Hayward*, 285 Mass. 459.

James Stewart & Co., Inc., v. *National Shawmut Bank*, 291 Mass. 534.

Bates v. *Boston Elevated Railway Co.*, 187 Mass. 328.

It has now become clear that the proceedings should have been dismissed at the beginning on the theory of *Marine Harbor Properties Inc.* v. *Manufacturers Trust Co.*, 62 S. Ct. 93.

Chapter 10 was not and is not the appropriate proceeding. The interests of all parties will best be served by other available proceedings.

From the omitted portion of the records it can be ascertained that there has never been any finding that the value of the premises exceeds the amount of the mortgages thereon; only a finding that the rental expected from the United States, together with rents derived from such tenants as have been allowed to remain on the premises, will be adequate to satisfy the terms of the mortgages and leave a surplus over and above such requirements that may be used for the satisfaction of other creditors.

That this finding was based in part upon an error of law became evident upon the second appeal, wherein it appeared that the District Court was of the opinion that the injunctions which were the subject-matter of the first ap-

peal "would be of no practical value" unless the rents "became a part of the general assets in the trustee's hands for the purposes of reorganization" (3931, Record, page 6). The original error has now resulted in a situation where the continuation of it makes a cure impossible. If we are to save the patient, some other remedy is indicated. As it stands now, the parties are restrained from seeking the appropriate remedy; obviously Chapter 10 was not designed or intended to cure all ills.

Fidelity Assurance Assoc. v. *Sims*, 318 U.S. 608.

The proceedings under Chapter 10 should be dismissed so as to permit the accomplishment of the following relief:

First: The rents should be first applied to the payment of the arrears on the first mortgage.

Second: The personal property should be sold and applied on the first mortgage.

Third: The condemnation moneys should be applied on the mortgage in appropriate proceedings.

Fourth: If it is desired to preserve the property for future use of the debtor, effort should be made to refinance it. Failing in such effort, the real estate should be sold either in bankruptcy proceedings or by mortgage foreclosure proceedings.

The reorganization proceedings, with their attendant orders, depriving the mortgagee of its possession, permitting the trustee to collect the rents on leases assigned to the mortgagee, restraining sale, and withholding application of the condemnation fund, have created a situation where the assets are being wasted by the accumulation of interest charges, taxes, storage charges, insurance and expenses of administration, without benefit to anyone,

except to permit two stockholders (Record, page 10), without risk to or contribution from them, to speculate on a possible increase in real-estate values, while creditors must suffer the risks of loss incident to further delay.

Since under the laws of the Commonwealth of Massachusetts damages by way of interest upon unpaid interest may not be recovered in any eventuality by the respondent first mortgagee, it has suffered irreparable loss, which loss is increasing as arrears accumulate during the pendency of the reorganization proceedings.

In conclusion, it is submitted that the petition for writ of certiorari should be denied for the following reasons:

1. The Circuit Court of Appeals was not in error.
2. The petition does not show proper cause within the provisions of Rule 38.
3. The petitioner seeks to bring before the Court only a fragment of the case and record.
4. The present inequitable situation should be speedily terminated.

Respectfully submitted,

G. K. RICHARDSON,

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Respondent.

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